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OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, L.L.P. 1940 DUKE STREET ALEXANDRIA, VA 22314			EXAMINER CHANNAVAJALA, LAKSHMI SARADA	
			ART UNIT 1611	PAPER NUMBER
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### **DETAILED ACTION**

Receipt of amendment and response dated 12-17-09 is acknowledged.

Claims 2 and 11 have been canceled. Claims 1, 3-10 and 12-19 are pending.

The following rejections have been maintained:

Claims 1-19 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 11, 17, 22-28, 30-41, 43 and 45-49 of copending Application No. 10/534753.

Applicants submit that a terminal disclaimer will be filed upon indicating allowance of the instant claims. Since no claims are allowed at this time, the rejection has been maintained.

In light of the arguments that Otsuka does not teach the claimed hydrophobated water absorbing polymer and instead teaches emulsified cosmetic and the types of powder include talc, kaolin, zinc oxide, titanium dioxide, mica and sericite, the following rejections have been withdrawn:

Claims 1-2, 7-11 and 16-19 are rejected under 35 U.S.C. 102(b) as being anticipated by Otsuka (JP05070322, translation provided).

Claims 3-6 and 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Otsuka (JP05070322, translation provided).

However, the following rejection of record has been maintained:

Claims 1, 3-10 and 12-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Masashi et al. (AU-B-25757/95) in view of Otsuka (JP05070322, translation provided).

Masashi discloses water absorbent resin particles comprising water absorbent resin particles (A) which are a cross linked polymer of ethylenically unsaturated monomers comprising acrylic acid and/or acrylic acid salt as an essential element, treated with an organic polysiloxane (B), wherein (A) and (B) are mixed and/or reacted, the particles have a particle size of 10-1000um and the weight ratio of (A)/(B) is 100/(0.001-5) (abstract). Masashi further discloses since the surface of (A) particles is improved with (B) liquid organic polysiloxane, the water absorbent resin particles have an improved hygroscopic blocking rate in a high humidity and obtain a wettability to prevent the generation of dust. Additionally, since the conventional disadvantage of disturbing uniform penetration of water caused by bonding of water-absorbent particles each other is improved by the modification effect of (B) in this invention, the absorption rate is improved. Examples of such water-absorbent resins (A) include cross linked partially neutralized polyacrylic acid, self-cross linked partially neutralized polyacrylic acid, cross linked graft-copolymers of starch-acrylic acid salt, hydrolyzed cross linked graft- polymers of starch-acrylonitrile, cross linked copolymers of vinyl alcohol-acrylic acid salt, hydrolyzed cross linked copolymers of acrylic acid-acrylamide, hydrolyzed cross linked copolymers of acrylic acid salt-acrylonitrile, cross linked copolymers of acrylic acid salt and 2-acrylamide-2-methyl propane sulfonate, neutralized cross linked copolymers of isobutylene-maleic anhydride, and mixture of two or more of these examples (page 7, 2nd paragraph). In the case when the above cross linked polymers shown are examples of water absorbent resins (A) are formed with carboxylic salts such as acrylic salt as a raw material, or when they form salts as a neutralized product or a

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partially neutralized product, examples of such salts include sodium salt, potassium salt, ammonium salt, and amine salt (page 7, last paragraph through page 8, top paragraph). Preferable organic polysiloxane compounds include amino-modified silicone oil such as the amino-modified silicone oil (see page 11 chemical structures). Since Masashi teaches the same polymer particles claimed in the instant application, absent a showing to the contrary, it is the position of the examiner that the particles would have the same functional limitations of claims 3-4 and 12-13.

While Masahi fails to exemplify a cosmetic emulsion and hence an antiperspirant composition and method claimed, Masahi teaches the particles may be admixed with fillers or additives including organic powders, natural polysaccharides, inorganic powders, including alumina, antioxidants, antiseptic agents, disinfectants, surface active agents, coloring agents, perfumes and deodorants (page 21, top paragraph).

Otsuka discloses a water in oil emulsion cosmetic characterized by comprising 0.1-10% by weight of a water absorbing polymer and 1-20% by weight of a dimethylpolysiloxane (abstract). The water absorbing polymer can include carrageenan, gelatin, agar, tragacanth gum, viscose, methylcellulose, ethylcellulose, hydroxyethylcellulose, carboxymethylcellulose, polyvinyl alcohol or the like by adding a polyvalent metal salt (paragraph 0009). Other examples include methacrylic acid, acrylic acid, a salt of ammonium, acrylamide, and VPV, for example (paragraphs 0010-0012), which includes crosslinked polymers and hence meet the claimed limitations. The hydrophobized powder is obtained by subjecting one or more types of powder to a hydrophobization treatment. Agents are preferably silicone oils, such as

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dimethylpolysiloxane, methyphenylpolysiloxane, methyhydrogenpolysiloxane, and the like (paragraph 0022). Thus, the description of Otsuka reads on instant silicone treated polymers Cyclic polysiloxane can also be used (paragraph 0033). The oil agent may be present in the amount of 0.1-20% by weight (paragraph 0024). The average particle size is 0.05-50um (paragraph 0023), reads on instant claim 2. Otsuka teaches that the composition is used as an antiperspirant (0002 and 0022) and hence reads on instant antiperspirant and hence the claimed method. In the emulsion, an antiperspirant substance is be blended within the range that does not impair the effect of the composition. Any substance can be used as long as it is a substance conventionally considered to have an antiperspirant action, for example an astringent salt aluminum or zirconium. The antiperspirant is present in the amount of 1-50% by weight (paragraph 0026). Accordingly, it would have been obvious for a skilled artisan at the time of the instant invention was made to use the water absorbing polymers particles of Masahi in cosmetic emulsion formulations, particularly, in antiperspirant formulations, because Otsuka suggests that the surface hydrophobized water absorbing polymer particles are very effective in reducing the sticky feeling observed with sweating and also imparts a long lasting effect in a cosmetic composition comprising cosmetic ingredients such as antiperspirants. A skilled artisan would have expected to achieve the above benefits with appropriate amounts of the polymer particles of Masahi.

***Response to Arguments***

Applicant's arguments filed 12-17-09 have been fully considered but they are not persuasive.

Applicants submit that the references of Otsuka and Masahi, alone or in combination do not render obvious the claimed invention for at least the following reasons. It is argued that the Office's asserted motivation to combine Masashi and Otsuka is based on the Office's mistaken belief that Otsuka discloses surface-hydrophobated water-absorbing polymer particles. Accordingly, in light of such an erroneous motivation to combine these two references, the Office has failed to provide a prima facie case of obviousness. Notwithstanding the above, even if a prima facie case of obviousness did exist in light of Masashi and Otsuka, which it does not, Applicants submit that the combination of these references still fails to render obvious the claimed invention. Applicants note that Masashi is drawn toward water-absorbing resin particles having 95 wt% or more of particles with a size of 10-1,000 microns, preferably 50-850 microns, and more preferably 200-600 microns (page 8, last paragraph, to top of page 9). Moreover, Masashi explicitly states that particles having a smaller particle size tend to form lumps at the time of water absorption which undesirably deteriorates the absorption rate (Id.). Accordingly, one skilled in the art would conclude that Masashi discloses a "preferred" working particle size of 50-850 microns, if not even higher (200-600 microns). Therefore, it is argued that one skilled in the art would have no motivation to look to particle sizes below 10, preferably 50, and more preferably 200 microns. Furthermore, courts have held that where, as here, the prior art disclosure suggests the

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outer limits of the range of suitable values, and that the optimum resides within that range, and where there are indications elsewhere that in fact the optimum should be sought within that range, the determination of optimum values outside that range may not be obvious (In re Sebek, 465 F.2d 902, 175 USPQ 93, 95 (CCPA 1972)). Thus, without any motivation to consider particle sizes below 10/50 /200 microns, Applicants' claimed average particle diameter of the surface-hydrophobated water-absorbing polymer particles of 0.1-10 microns is not rendered obvious by Masashi. Accordingly, Applicants' independent claims (i.e., claims 1 and 10) are not rendered obvious by Masashi. Therefore, given the disclosure of Masashi concerning particle size and the desired particle size range of the claimed invention, one would not look to Masashi for guidance with respect to a cosmetic emulsion. This conclusion is further supported by Masashi's disclosure that smaller particles are undesirable and that the particles are employed for diapers and not cosmetics.

Applicants' arguments are not persuasive because even though Otsuka does not teach the surface hydrophobated water absorbing polymers, on page 11 Otsuka teaches reduced stickiness can be achieved by hydrophobizing treatment of powders such as talc, kaolin, clay etc., and the surface treatment is achieved with silicones. Otsuka also teaches that the hydrophobized powders are in the range of 0.05 to 50 microns. Thus, a skilled artisan would have looked to the teachings of Otsuka because Masahi teaches that cosmetic compositions may be incorporated in their compositions and Otsuka teaches hydrophobated (with silicone treatment) powder particles of 0.05 to 50 microns are effective in enhancing reduced stickiness. A skilled artisan would have

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recognized that particle sizes as low as 0.05 microns would be effective when the hydrophobic particles are used in cosmetic compositions. While Masahi teaches higher particle sizes it would have been obvious for a skilled artisan at the time of the instant invention was made to try to employ an appropriate particle size because Masahi teaches a range of 10-1000 microns (page 8). [A] person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely that product [was] not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.” KSR International Co. v. Teleflex Inc., 550 U.S. \_\_\_, \_\_\_, 82 USPQ2d 1385, 1397(2007). A skilled artisan would have achieved the same advantages i.e., high water absorption and uniform penetration of the water with a particle size range of 10-1000 microns and also the reduce stickiness in the range of 0.05-50 microns. On the other hand, applicants have not provided any unexpected advantage with the claimed particle sizes that is not taught by the combination of Masahi and Otsuka.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not

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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lakshmi S. Channavajjala whose telephone number is 571-272-0591. The examiner can normally be reached on 9.00 AM -5.30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila G. Landau can be reached on 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lakshmi S Channavajjala/  
Primary Examiner, Art Unit 1611  
March 14, 2010